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81-2248

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MELFORD BERNS,
Petitioner,

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari
To the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the statute of limitations (18 U.S.C. § 3282) bars prosecution where the only false matters in controversy occurred more than five years before the indictment and the only act allegedly within the limitation period consisted of the mere submission of a claim to the government based upon the time-barred falsifications.

II.

Whether the District Court, being advised in advance that witness Plocker, the brother-in-law of petitioner and a non-immunized unindicted co-conspirator, would invoke his Fifth Amendment privilege, erred in directing that he assert his privilege in front of the jury, contrary to the doctrine and procedure established in *Namet* v. *United States,* 373 U.S. 179 (1963), and numerous Court of Appeals decisions.

III.

Whether witness Becker could testify as to certain statements allegedly made by Plocker outside the presence of petitioner, where there was no independent evidence of the existence of a conspiracy involving Plocker.

IV.

Whether a waiver of the attorney - client privilege by petitioner's employer bars petitioner from asserting the privilege afforded him by *Upjohn Company* v. *United States,* 449 U.S. 383 (1981).

V.

Whether, under *Kotteakos* v. *United States,* 328 U.S. 750 (1946), the District Court erred in submitting the cause to the jury for the reason that if there was evidence of a conspiracy, the government's proof was as to the existence of multiple separate conspiracies.

LIST OF PARTIES

Petitioner Melford Berns is an individual residing in St. Louis County, Missouri.

Although not parties to the proceedings below, the following corporations were frequently mentioned in the evidence, as the contract between them was involved in these proceedings:

Union Carbide Corporation, Nuclear Division, Oak Ridge, Tennessee, a publicly-held corporation;

Burnup & Sims, Inc., a publicly-held corporation, and its wholly-owned subsidiary, Line Dismantling Company.

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OPINIONS BELOW

This cause was decided on January 4, 1982, by a panel of the United States Court of Appeals for the Sixth Circuit (Circuit Judges Weick, Engel and Merritt), in an opinion, designated an order, which has not been officially reported. This order is reproduced as Appendix A hereto.

On April 7, 1982, the Court of Appeals entered an order denying petitioner's petition for rehearing. (See Appendix B.) No opinion was written, and the order has not been officially reported.

The District Court (The Honorable Robert L. Taylor, United States District Judge for the Eastern District of Tennessee) filed an order and memorandum opinion on November 19, 1980, denying petitioner's post-trial motion for judgment of acquittal and motion for new trial. Said order and opinion have not been officially reported, and are reproduced as Appendix C hereto.

JURISDICTION

The order of the United States Court of Appeals affirming petitioner's conviction was entered on January 4, 1982. (See Appendix A.) No separate judgment was entered by the Court. Petitioner filed a timely petition for rehearing and suggestion of appropriateness of rehearing en banc, which was denied on April 7, 1982. (See Appendix B.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

This petition involves an interpretation of the Fifth Amendment to the Constitution of the United States, the text of which is set out in Appendix D.

Petitioner was charged with felony violations of 18 U.S.C. §§ 371, 2, 287 and 1001, the text of which are set out in Appendix E. This petition also involves an interpretation of the statute of limitations contained in 18 U.S.C. § 3282, the text of which is also set out in Appendix E.

This petition also involves an interpretation of Rules 104(a) and (b) and 801 (d)(2)(E) of the Federal Rules of Evidence, the text of which is set out in Appendix F.

STATEMENT OF THE CASE

Petitioner Melford Berns and Gerald J. Aul[1] were charged with violations of federal law in a four-count indictment (A-5)[2] filed in the United States District Court for the Eastern District of Tennessee at Knoxville. Count 1 charged that between July 1, 1974 and the return date of the indictment (June 11, 1980), Aul, petitioner and two unindicted co-conspirators, Edmund R. Shulman and Stanley Plocker, conspired with each other and others unknown, in violation of 18 U.S.C. § 371, to defraud the United States by presenting a false claim (18 U.S.C. § 287) to an agency of the United States and by making false statements (18 U.S.C. § 1001), in connection with matters within the jurisdiction of a department or agency of the United States. Of twenty-nine overt acts alleged in Count 1, only one (No. 29) (A-16) was within the five-year period immediately preceding the filing of the indictment.

Count 2 of the indictment charged that on or about July 1, 1975, Aul and petitioner presented a false claim in the amount of $709,898.00 to the Energy Research and Development Administration (now the Department of Energy), an agency of the United States, in violation of 18 U.S.C. §§ 2 and 287. Count 3 charged that on or about July 1, 1975, Aul and petitioner made false statements and representations to the government agency

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[1] The proceedings as to Aul were transferred to a United States District Court in California where his case was disposed of pursuant to Rule 20 of the Federal Rules of Criminal Procedure. He was sentenced to a term of imprisonment for six months, plus probation thereafter. Aul was in Knoxville during the trial of the charges against petitioner, having been subpoenaed by the government, but was not called as a witness.

[2] References to "A" are to the pages of the Appendix filed in the Court of Appeals; references to "Tr." are to the pages of the reporter's transcript of proceedings in the District Court, the numbers appearing on the upper right hand corner of the Appendix pages.

with reference to losses sustained by the alleged cancellation of false and fraudulent contracts pertaining to copper cable between Line Dismantling Company (hereinafter LDC) and Shulman international Metals Company (hereinafter SIMCO), in violation of 18 U.S.C. §§ 2 and 1001. Count 4 charged that on or about July 1, 1975, Aul and petitioner made false statements to the government agency by submitting three false and fraudulent contracts between LDC and NIMCO Trading Company, Inc. (hereinafter NIMCO), and three false and fraudulent contracts between LDC and SIMCO, in violation of 18 U.S.C. §§ 2 and 1001.

Petitioner's trial commenced on October 6, 1980 (A-2), and on October 9, the jury found petitioner guilty on all four counts (Tr. 694, A-606). Various witnesses and documents were offered by the government, but petitioner called no witnesses. The sufficiency of the evidence, as well as other evidentiary issues and an issue pertaining to the statute of limitations, were raised on appeal.

The evidence on the part of the government tended to show that Aul and petitioner were President and Vice-President respectively of LDC, a Missouri corporation, which was a wholly-owned subsidiary of Burnup & Sims, Inc., a publicly-held corporation. The testimony indicated that Aul was the chief executive officer and petitioner was primarily engaged in field operational activities (Tr. 358-359, 437-439, 518-519, 539, 554-555, A-352-353, 431-433, 502-503, 524-525).

LDC's business consisted of bidding on contracts with governmental agencies, utilities, railroads, etc., for the dismantling of long-distance wire and communcation cable lines. LDC was the successful bidder on a contract, UCC-ND 2146 (Exh. 1, A-607), with Union Carbide Corporation, Nuclear Division, Oak Ridge, Tennessee, for the purchase, dismantling and removal of surplus cable, consisting of lead, copper and other materials, for a total sales price of

$1,361,234.00 (Tr. 21-22, A-36-37).[3] Aul bid on the contract in behalf of LDC on November 14, 1973, and his bid was accepted by Union Carbide on November 16, 1973 (Exhs. 1 and 2, Tr. 23, 82-84, A-607, 611, 614, 641, 38, 97-99). Performance of the contract was basically in two phases. Phase one was completed successfully and without incident in January, 1974. The second phase was to commence on October 1, 1974, and to be completed within 90 days (Tr. 25-28, 84-85, A-40-43, 99-100).

On August 21, 1974, petitioner, who happened to be in LDC's office in St. Louis, received a telephone call from D. R. McCammon, Sales Coordinator of Union Carbide,[4] who informed petitioner (confirmed by telegram - Exh. 17, Tr. 111, A-669, 126), that Union Carbide would not be able to meet the October 1 commitment under the contract, and that only 15% to 20% of the copper would be available at that time. Petitioner indicated that this would create damages for LDC, and that he would have to notify the purchasers who were under contract with LDC to buy the copper. McCammon's notes reflected that petitioner mentioned Lissner and Nuclear Trading as the purchasers, and McCammon testified that petitioner might have said NIMCO Trading instead of Nuclear (Tr. 32-35, 39-40, 98-112, A-47-50, 54-55, 113-127).

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[3] The value of the contract to LDC was that the cable contained substantial copper, for which there was a ready resale market. In early 1974, the price of copper was high, but it dropped substantially during the succeeding months prior to October, 1974 (Tr. 360, A-354). It is a common business practice for a dismantling company, prior to commencing work, to enter into contracts for the subsequent resale of the copper, so that at the time of dismantling it could be shipped immediately to the purchaser. By entering into such a contract, the dismantler knows what he can obtain on the resale and generally determine his profit. He would not be affected by fluctuations in the copper market or be subject to loss if the market declined drastically between the time of his bid and the time of dismantling (Tr. 360-366, A-354-360).

[4] Mr. McCammon had been dealing with Aul and had tried to call him, but Aul was not in St. Louis on that day (Tr. 35, 103-104, A-50, 118-119).

Before and after that date, there was considerable correspondence and telephone conversations between Aul (not petitioner) and Union Carbide representatives concerning these performance problems and damages (Exhs. 4-9, 16, 18-22, Tr. 29-32, 36-46, 49-51, 88-98, 112-121, 127-128, A-643-650, 668, 670-677, 44-47, 51-61, 64-66, 103-113, 127-136, 142-143). Aul advised Union Carbide's representatives that LDC had entered into contracts for the resale of the copper, that when the purchasers learned that the contract would not be completed on schedule, they cancelled the contracts to buy (the market on copper having dropped at that time), and that as a result, LDC stood to lose $600,000.00 or $700,000.00 in damages.

Thereafter, LDC and Union Carbide representatives met in Oak Ridge on September 4 and 24, 1974. Efforts were made to resolve the problem and avoid substantial damages claimed by LDC. The evidence indicated that petitioner attended but took very little part in these meetings, and that he only participated in conversations or in correspondence concerning the operational completion of the contract (Exhs. 10-12, 23, Tr. 51-57, 123-125, 128-131, A-651-654, 681-684, 66-72, 138-140, 143-146). The matter was finally resolved at the September 24, 1974 meeting, when LDC was permitted to deposit only a portion of the money required under the original contract with a bond guarantee as to the balance, and Union Carbide would provide other cable for some of that which could not be removed because of the delays, it being understood that LDC would thereafter attempt to settle or file a claim for damages. This settlement was negotiated for LDC by Aul and an attorney from the Washington law firm of White and Case. All LDC participants left after the settlement, except petitioner, who remained an extra day to discuss resumption of the field operations with Union Carbide (Exh. 13, Tr. 46-48, 57-73, 121-127, 131-136, 138-147, 166-170, 171-173, 393-398, 404-408, 520-524, 556-559, A-655, 61-63, 72-88, 136-142, 146-151, 153-162, 181-185, 186-188, 387-392, 398-402, 504-508, 526-529).

Thereafter, the dismantling operations began and the contract was completed, but the issue of damages still remained. On October 11, 1974, Aul (not petitioner) sent a telegram to Union Carbide (Exh. 14, Tr. 73-75, A-656-658, 88-90), and Chester Brewer, an LDC vice-president in the home office of Burnup & Sims, sent a lengthy letter to Union Carbide (Exh. 15, Tr. 76, 524-528, 571-572, A-659-667, 91, 508-512, 541-542), claiming $662,500.00 damages. The Brewer letter reviewed the history of the matter and referred to contracts with NIMCO and SIMCO to purchase the copper and lead (Exhs. 29-37, A-698-706). He also stated that the copper contracts had been cancelled by SIMCO on August 21, 1974, the cancellation notice (Exh. 43, A-741) having been received at the Burnup & Sims home office on September 23, 1974 (Tr. 572-575, A-542-545).

There was substantial correspondence thereafter (Exhs. 24-26, A-685-688) and efforts by LDC (Brewer and Aul, but not petitioner) to obtain copies of the NIMCO and SIMCO contracts for Union Carbide (Tr. 147-151, 170-171, A-162-166, 185-186). In fact Aul, Brewer and a White and Case lawyer traveled to California to meet with SIMCO's principal, Edmund Shulman, and they attempted to get copies of the contracts (Tr. 231-234, 304-311, 528-529, 531-539, 564-571, 577-578, A-246-249, 319-326, 512-513, 515-523, 534-541, 547-548). Finally, on December 17, 1974, a letter (Exh. 27, A-689-692) was sent by Aul (not petitioner) to Union Carbide, together with a package of documents (Exh. 28, A-693-697) which included the NIMCO and SIMCO contracts (Exhs. 29-37, A-698-706); this letter set forth the basis of LDC's claim for $734,250.00 (Tr. 151-164, 173-174, A-166-179, 188-189).

Under the original contract between Union Carbide and LDC (paragraph 14, pages 10-11, A-617-618), disputes which could not be settled were to be decided by the "Contracting Officer". When the claim submitted by Aul on December 17, 1974 (Exhs. 27 and 28, A-689-697) was not resolved, a letter (Exh. 38,

A-707-727) dated June 19, 1975, was addressed to R. J. Hart, Contracting Officer for the Department of Energy. The letter to Mr. Hart was basically a consolidation of the letters of October 11, 1974 from Brewer of LDC to Union Carbide (Exh. 15, A-659-667) and the claim letter of December 17, 1974 from Aul to Union Carbide (Exh. 27, A-689-692); a package of documents (Exh. 39, A-728-733), again including the NIMCO and SIMCO contracts, was attached. Mr. Hart testified that Exhibits 38 and 39 were received on July 1, 1975; he also testified that he had been aware of the claim submitted to Union Carbide (Exhs. 27 and 28) for at least six months before he received the letter dated June 19, 1975 (Tr. 177-187, A-193-202).[5]

The letter of June 19, 1975, purported to bear the signatures of Aul and petitioner, but there was no evidence that petitioner signed the document. (Although the government did not introduce the evidence, FBI handwriting experts had stated that they could not testify that the signature was that of petitioner.)

The government's evidence as to the falsity of the SIMCO contracts on which the claim was based relied on the testimony of Edmund Shulman, an unindicted co-conspirator who appeared under a grant of immunity (Tr. 213, A-228).[6] He testified that Aul (not petitioner) had proposed to him, after it appeared

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[5] As a matter of fact, Hart had been sent a copy of the Brewer letter of October 11, 1974 (Exh. 15, A-659-667). He had earlier received a copy of a letter sent by LDC's attorney to Hart's predecessor as "Contracting Officer" (Exh. 22, A-677-679).

[6] Union Carbide was suspicious of the NIMCO and SIMCO contracts at least as early as April 18, 1975, when Union Carbide lawyers interviewed Shulman in California (Tr. 192, A-207), but Shulman then maintained that they were valid contracts (Tr. 197, A-212). Corroborative of Shulman's initial representation of validity of the contracts was a statement of Burnup & Sims' president that he had seen the original NIMCO contracts in St. Louis in the spring of 1974 (Tr. 561-563, A-531-533).

Union Carbide could not complete the delivery of the copper on time, that they prepare some back-dated contracts which would give the impression that LDC had sold the copper to NIMCO, and thereafter on the same terms to its successor SIMCO, at prices favorable to LDC, and that SIMCO would then cancel these contracts because of the inability of Union Carbide to deliver (Exh. 43, Tr. 237-239), A-741, 252-254), so that Aul would have evidence of the substantial loss suffered by LDC. Shulman explained that originally he had done business as NIMCO and that the original phony contracts would be made with NIMCO. Thereafter, SIMCO was incorporated and took over the business of NIMCO, assuming the NIMCO-LDC contracts. Shulman testified that all these contracts were not valid. For his part in the transaction, Aul promised that Shulman would receive $40,000.00 - $50,000.00, which he never received (Tr. 213-220, 223-231, 234-242, 255-257, 258, 279-297, 300-304, A-228-235, 238-246, 249-257, 270-272, 273, 294-312, 315-319).

NIMCO had another contract with LDC, also replaced by a SIMCO contract, pertaining to purchase of lead from the project (Exhs. 35, 36, and 37, A-704, 705, 706). Over objection (Tr. 245-246, A-260-261), Shulman testified that he did, in fact, receive the lead, but that he and Aul agreed that SIMCO would downgrade the lead, that is, claim that it was inferior to contractual specifications, so that Aul would reduce the price to SIMCO (Exhs. 46, 50, A-744, 748-752). Shulman claimed that he was to give one-half of the price reduction to Aul, thus cheating LDC but not Union Carbide or the government in any way. He testified that he delivered a cashier's check for $15,000.00 payable to "H. E. Rosen" (Exh. 47, A-745) to petitioner in Las Vegas on November 14, 1974, which petitioner therafter cashed, and that petitioner then gave him $7,500.00 in gambling chips. There was no other evidence that petitioner had cashed the check; the evidence tended to show that petitioner was not then in Las Vegas (a few days after the birth of his youngest child in St. Louis), but that Aul was on his way back from Los Angeles,

and that he was a guest at the Desert Inn in Las Vegas on November 13 and 14, 1974 (Exh. 88, Tr. 220-222, 225, 244-250, 254-255, 263-268, 275-278, 297-300, 305, 311-315, 321-322, 566-567, 575-577, 625-632, A-834, 835, 837, 847, 235-237, 240, 259-265, 269-270, 278-283, 290-293, 312-315, 320, 326-330, 336-337, 536-537, 545-547, 583, 590).

Over objection (Tr. 345-346, A-339-340), the Court admitted evidence concerning other sales by LDC of copper, F.O.B. Oak Ridge, to Lissner Minerals and Metals and Gerald Metals (Exhs. 52, 53, 55, and 56, A-754, 755, 757, 758).[7] When it appeared unlikely that the copper would be delivered as scheduled from the Oak Ridge project, LDC arranged for Becker Iron & Metals of St. Louis to assume the LDC contracts with Lissner and Gerald and to deliver the copper to them. Such transfers of contracts are not unusual (Exhs. 51, 54, 57, Tr. 347-370, 373-390, A-753, 756, 759, 341-364, 367-384).[8]

Becker Iron & Metals was operated by the Becker family, including David Becker, who testified, and Stanley Plocker, who refused on Fifth Amendment grounds to testify for the government. Becker's testimony indicated that Plocker had discussed the deal he had allegedly made with petitioner whereby Becker Iron & Metals would take over the performance of LDC contracts with Lissner and Gerald. According to a worksheet prepared by Plocker, the company agreed to pay LDC a commission of $122,000.00 (Exh. 73, A-800). Thereafter Plocker

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[7] There was evidence from persons in the business that it was not unusual to sell more copper than might come out of a project because copper could always be bought on the open commodities market (Tr. 364-366, A-358-360).

[8] Actually copper was not delivered on the Gerald contract; Gerald and Becker agreed to, in effect, cancel the agreement and Gerald paid Becker $91,250.00 for the cancellation (Exhs. 58, 59, Tr. 378-382, 388-389, A-760, 761, 372-376, 382-383).

allegedly told Becker that petitioner wanted the checks to be made payable to "M. T. Stuart", and cashier's checks (Exhs. 66-70, A-755-779) were so issued, according to vouchers (Exhs. 81-85, A-808-812) authorized by Becker (Tr. 452-454, 456-480, 484-488, 489-509, 512-515, A-436-438, 440-464, 468-472, 473-493, 496-499).

There was evidence concerning other Becker company checks made payable to "M. T. Stuart" and "L. C. Jones" (Exhs. 64-65, 74-80, Tr. 482-484, 509-512, A-773-774, 801-807, 466-468, 493-496), and the checks in evidence were apparently cashed at Las Vegas hotels. Records of the Desert Inn in Las Vegas as to separate visits by petitioner (Exh. 87, A-814-833) and Aul (Exh. 88, A-834-847) had entries bearing the names of Stuart and Jones, but there was no competent testimony as to the actual cashing of the checks, other than record identification by the present custodian who had no personal knowledge or duties as to the transactions (Tr. 598-599, 615, A-556-557, 573).

At the close of the government's case, petitioner's motion for judgment of acquittal was overruled (Tr. 644, A-2, 602), and he did not testify or present any further evidence. The cause was submitted to the jury on all four counts, and the jury returned a verdict finding him guilty as to all counts (Tr. 694, A-606).

Thereafter, petitioner filed a post-trial motion (A-3); on November 19, 1980, this motion was denied (A-4, 26-30; see also Appendix C hereto), and he was sentenced to a term of imprisonment for three years on Count 1, with parole eligibility at such time as the United States Parole Commission may determine, under the provisions of 18 U.S.C. § 4205(b). Petitioner was also sentenced to pay a fine of $10,000.00 on each of Counts 2, 3, and 4, for a total fine of $30,000.00 (A-4).

On November 19, 1980, petitioner duly filed his notice of appeal (A-4, 31) to the United States Court of Appeals for the

Sixth Circuit, and he was released on his existing bond pending appeal (A-4). The cause was argued before a panel of the Court of Appeals on December 15, 1981, and on January 4, 1982, an order was entered affirming the conviction of petitioner. (See Appendix A hereto.) Thereafter, petitioner filed a petition for rehearing and suggestion for rehearing en banc, which was overruled on April 7, 1982 (Appendix B).

This petition for a writ of certiorari seeks to review the judgment of the Court of Appeals affirming the conviction of petitioner.

ARGUMENT

I.

Statute of Limitations

The indictment was filed on June 11, 1980 (A-1, 5). The only overt act alleged in the conspiracy count to be within five years before the filing of the indictment was the letter dated June 19, 1975 to R. J. Hart, Contracting Officer (Exh. 38, A-707-727). This letter was also the basis of the allegations of the substantive counts 2 to 4 (A-16-20). Petitioner believes that the five-year statute of limitations contained in 18 U.S.C. § 3282, as interpreted by case law, barred the prosecution in this case.

The indictment alleged and the proof indicated that the NIMCO and SIMCO contracts (Exhs. 29-34, A-698-703), which the government claimed were not legitimate, were signed sometime in 1974, at which time the statute of limitations began to run. Even if a claim were later submitted on June 19, 1975 by petitioner,[9] such fact would not start the running of a new period of limitations.

In *United States* v. *Laut,* 17 F.R.D. 31 (S.D.N.Y. 1955), the defendant made false statements in 1950; in 1951, he was asked if those statements were true; a subsequent perjury indictment was based upon his 1951 statement of truthfulness, thereby attempting to avoid the bar of the statute of limitations applicable to the 1950 statements. Acknowledging that the statute of limitations is a recognition of the Congressional "policy of

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[9] There was no proof that petitioner had anything to do with the filing of the June 19 letter; in fact, FBI handwriting experts had stated that they could not testify that the signature was that of petitioner. For this reason, *Grunewald* v. *United States,* 353 U.S. 391 (1957), cited by the Court of Appeals in its decision herein, is not controlling because there was no evidence that the alleged overt act of June 19, 1975 was committed by petitioner or while he was a member of any conspiracy.

repose", which is to be liberally interpreted in favor of repose,[18] the Court decided that the gravamen of the offense was the statements made in 1950 and the proof therefore related to the 1950 events. A mere reassertion in 1951 was not sufficient to toll the statute of limitations.

Similarly, in the instant case, the alleged submission of the claim on June 19, 1975 merely related back to the 1974 events. As the Court said in *Laut* (l.c. 37):

> "Sustaining such procedure would permit dodging the Statute of Limitations at will. . . .Such a result would be openly at war with the 'theory', on which 'Statutes of Limitation are founded * * * that prosecution should not be allowed to ferment endlessly in the files * * * to explode only after witnesses and proofs necessary to the protection of the accused have by sheer lapse of time passed beyond availability.' "

Compare *Wellman* v. *United States*, 253 F. 2d 601, 604 (6th Cir. 1958), where it was held that the earlier crucial acts determined the date for commencement of the statute of limitations.

In *United States* v. *Davis*, 533 F. 2d 921 (5th Cir. 1976), a case involving conspiracy to make false statements to the government, the statute of limitations was the primary and decisive issue on appeal. In a lengthy discussion of the statute of limitations, the Fifth Circuit ruled that the false and fraudulent activity had occurred more than five years prior to the indictment, just as in the instant case, and that the government could not come within the period of limitations by proof that a contract was entered into within the five-year period. The Court further

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[18] Quoting, among other cases, *Bridges* v. *United States*, 346 U.S. 209, 215-216 (1953), and *United States* v. *Scharton*, 285 U.S. 518, 521-522 (1931). See also *Toussie* v. *United States*, 397 U.S. 112, 114-115 (1970).

held that other acts with reference to the false documents, within the five-year period, would not toll the statute of limitations.

In the instant case, the government should not be permitted to rely upon the letter to Mr. Hart of June 19, 1975, because all of the acts had taken place prior to that time.[11] Even if there was proof that petitioner was a member of a conspiracy and that the letter was sent to Mr. Hart on or about June 19, 1975, nevertheless all of the acts relative to the phony NIMCO and SIMCO contracts, according to the government's own proof, were completed before the commencement of the period of the statute of limiations.

The Court of Appeals herein refused to consider petitioner's argument that the offense, if any, occurred in the preparation of the phony NIMCO-SIMCO contracts prior to the limitations period. This petition presents the issue as to whether the statute of limitations may be extended by subsequent false statements

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[11] In fact, the claim had been submitted previously. Mr. Smith, attorney for Union Carbide, testified that he considered the letter of December 17, 1974, signed by Aul (Exh. 27 and 28, A-689-692, 693-697) to be a claim filed with Union Carbide and the United States Government (Tr. 174, A-189). Mr. Hart, to whom the letter of June 19, 1975 was directed, testified that he knew long prior to that time, and certainly before January 1, 1975, that the claim was being asserted (Tr. 186, A-201). He had been sent a copy of a letter from LDC's attorney on September 16, 1974, explaining the problem and indicating "losses in excess of $700,000.00"; this letter was addressed to Hart's predecessor as Contracting Officer (Exh. 22, A-677-679). In addition, Hart was also furnished a copy of the lengthy letter from LDC dated October 11, 1974, which elaborated the claim of LDC for losses of $662,500.00 and made specific reference to the NIMCO and SIMCO contracts (Exh. 15, A-659-667). Even the prosecutor acknowledged that "the letter of December 17th, '74, is making a claim" (Tr. 163, A-178), and referred to "the claim submitted by Line Dismantling Corporation against, first, the Union Carbide Corporation as agent for the United States, and then later to you (Mr. Hart) as the contracting officer" (Tr. 178, A-193).

or perjurious testimony relating entirely to otherwise barred activites. The decision below is not only in conflict with *United States* v. *Davis, supra,* decided by the Fifth Circuit, but also with the "policy of repose" of the statute of limitations which must "be liberally interpreted in favor of repose", as explained by this Court in *Toussie* v. *United States, supra.*

For these reasons, we respectfully suggest that certiorari should be granted as to this Question.

II.

Plocker's Fifth Amendment invocation

The government was on notice at the outset that Stanley Plocker would refuse to testify on grounds of Fifth Amendment privilege. Before the trial began, Plocker's attorney filed a motion to quash the subpoena served upon him by the government (A-21-25), specifically invoking his privilege against self-incrimination (A-22). Plocker requested the Court to "make any appropriate inquiry it deems necessary, including a hearing, to assess the propriety of the claim" (A-24), obviously suggesting that such hearing be conducted outside the presence of the jury.[12]

That Plocker had the right to invoke his privilege was clear from the indictment which named him as an unindicted co-conspirator (A-5, 10, 13, paragraphs 13 and 14, Overt Acts 8, 9, and 12), from his counsel's presentation to the Court, and from the facts as understood by the government. The government could, of course, have sought immunity for him and compelled his testimony under the immunity statutes, 18 U.S.C. § 6001 *et seq.* Without apparently making any effort to secure immunity

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[12] Although the Court Reporter did not record the discussion at the bench, it is obvious that Plocker's attorney, Joseph M. Tipton, was at the bench with the Court and counsel concerning Plocker's Fifth Amendment assertion (Tr. 3, A-33).

before calling Plocker as a witness, the prosecutor told the Court at the bench, just before bringing him into the courtroom in front of the jury, that "I understand when he is called to the stand will refuse to testify on the grounds of self-incrimination" (Tr. 415, A-409). The prosecutor was reluctant to have the witness invoke the privilege in front of the jury, but the Court, over petitioner's objection, ordered that the case be tried "in front of the jury" (Tr. 416, A-410).

Thereupon Plocker took the witness stand and immediately invoked the privilege on two occasions, but the Court refused to allow the privilege and ordered him to answer the questions (Tr. 418, A-412). After a few more questions concerning his family relationship to petitioner and his acquaintance with Aul, the Court then curiously interrupted the prosecutor and asked: "Are you going to ask him something that will involve the Fifth Amendment?" (Tr. 420, A-414). When the prosecutor answered affirmatively, the Court ordered the jury out (Tr. 421, A-415).

A discussion then took place between the Court, the prosecutor and Plocker's attorney as to the efficacy of the prosecutor's promise not to prosecute the witness (Tr. 421-425, A-415-419). The subject of a formal grant of immunity was discussed, and the Court instructed the prosecutor to "go in there and call the Attorney General of the United States" (Tr. 425-426, A-419-420), and the witness left the stand so that the prosecutor could contact the Attorney General and proceed under the immunity statutes (Tr. 426-429, A-420-423). At the end of the day, the Court reminded the prosecutor to make his call (Tr. 481, A-465). Mr. Plocker was not thereafter called as a witness.

Under these circumstances, it was error to put Plocker on the stand, have him invoke the Fifth Amendment in front of the jury, and then dismiss him without further action. The impact upon the jury was certainly prejudicial, especially when combined with the erroneously admitted testimony of Mr. Becker. (See Question III of this petition.)

This Court considered the propriety of a witness invoking his Fifth Amendment privilege before the jury in *Namet* v. *United States*, 373 U.S. 179 (1963), focusing on prosecutorial misconduct and unfair inferences. In the instant case, the prosecutorial misconduct[13] was obvious from calling the witness with certainty that he would invoke his privilege, and at the same time suggesting to the Court that authorization for immunity would be secured. It never materialized!

The unfair inferences resulting from the assertion of the privilege were exacerbated by the combination of factors that Plocker was petitioner's brother-in-law[14] and was named as a co-conspirator in the indictment, that there was no direct evidence of petitioner's participation in the alleged conspiracy, and that Becker was shortly thereafter permitted to testify as to statements allegedly made by Plocker. The conflict between the procedure in this case and the *Namet* decision suggests the propriety of a summary reversal.

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[13] Combined with prosecutorial misconduct in this case was the District Court's erroneous insistence that the privilege be invoked "in front of the jury" (Tr. 416, A-410), apparently resulting from the District Court's erroneous prior practice of having "tried maybe a hundred cases, more or less, when they have taken it in the presence of the jury" (Tr. 416, A-410). Compare *United States* v. *Ritz*, 548 F. 2d 510 (5th Cir. 1977), where the trial Court made a similar comment (p. 516).

[14] Some courts have commented upon the prejudice resulting from a family relationship between the witness and the defendant. See, for example, *San Fratello* v. *United States*, 340 F.2d 560, 566-567 (5th Cir. 1965), reh. den. 343 F. 2d 711, and *United States* v. *Ritz*, 548 F. 2d 510, 518-521 (5th Cir. 1977). Compare cases involving a marital privilege, such as *Labbe* v. *Berman*, 621 F. 2d 26, 27-28 (1st Cir. 1980), and *Melton* v. *United States*, 398 F. 2d 321, 322 (10th Cir. 1968), holding that "the prosecution should not call a witness in the presence of the jury when it knows, and concedes, that the witness will invoke a valid marital privilege."

The decision of the Sixth Circuit is in conflict with decisions of many other Circuits, representative of which are the following: *Robbins* v. *Small*, 371 F. 2d 793 (1st Cir. 1967), cert. den. 386 U.S. 1033, *Zeigler* v. *Callahan*, 659 F. 2d 254, 270-273 (1st Cir. 1981), *United States* v. *Maloney*, 262 F. 2d 535 (2nd Cir. 1959),[15] *Rado* v. *Connecticut*, 607 F. 2d 572, 581-582 (2nd Cir. 1979), *San Fratello* v. *United States*, 340 F. 2d 560 (5th Cir. 1965), reh. den. 343 F. 2d 711, *United States* v. *Prior*, 546 F. 2d 1254, 1258 (5th Cir. 1977), *United States* v. *Tuley*, 546 F. 2d 1264, fn. 7 (5th Cir. 1977), *United States* v. *Ritz*, 548 F. 2d 510, 515-521 (5th Cir. 1977), *United States* v. *King*, 461 F. 2d 53, 56-57 (8th Cir. 1972), *Sanders* v. *United States*, 373 F. 2d 735 (9th Cir. 1967), *United States* v. *Coppola*, 479 F. 2d 1153, 1159-1161 (10th Cir. 1973), *Melton* v. *United States*, 398 F. 2d 321[5] (10th Cir. 1968), *United States* v. *Dingle*, 546 F. 2d 1378, 1381-1384 (10th Cir. 1976), and *Fletcher* v. *United States*, 332 F. 2d 724 (D.C. Cir. 1964).[16] For an illustrative state decision, compare *DeGesualdo* v. *People*, 364 P. 2d 374, 376-378 (Colo. 1961). See also Annotation, "Prejudicial effect of prosecution's calling as witness, to extract claim of self-incrimination privilege, one involved in offense with which accused is charged." 86 A.L.R. 2d 1443.

Because the procedure followed by the District Court in permitting petitioner's brother-in-law, an unindicted co-conspirator, to invoke his Fifth Amendment privilege before the jury was violative of petitioner's right to a fair trial, as well as his right of confrontation and cross-examination, and because

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[15] Judge Hand's opinion in *Maloney* is discussed at length in *Namet* v. *United States*, 373 U.S. at 186-190.

[16] Although the Sixth Circuit seemingly joined the other Circuits in *United States* v. *Vandetti*, 623 F. 2d 1144 (6th Cir. 1980), the decision in the instant case appears to be a withdrawal from the mainstream of decisions throughout the country.

of the conflict of the proceedings below with decisions of this Court and numerous Court of Appeals decisions, we respectfully submit that certiorari should be granted as to this Question. The error below was so clear that summary reversal would be appropriate.

III.

Becker Testimony Of Plocker Statements

Plocker was an alleged co-conspirator, named in the indictment (A-5, 10, 13). In open court, he refused to testify. Although the prosecutor indicated that he would obtain a grant of immunity, he never did. (See Question II of this petition.) Thus there was no testimony by Plocker or anyone else to substantiate the allegation that he was a member of a conspiracy with petitioner.

Thereafter Plocker's former business associate, David Becker, was called as a witness (Tr. 451, A-435). When Becker was asked to testify as to statements allegedly made by Plocker,[17] petitioner objected. The prosecutor stated that "the statements of an unindicted co-conspirator would be admissible as an exception to the hearsay rule" (Tr. 460, A-444). The Court recognized that there must be "some proof that this individual referred to was a part of the conspiracy" (Tr. 461, A-445), and obviously was under the impression that the government would provide evidence independent of the hearsay to show that Plocker and petitioner were participants in a conspiracy.

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[17] On cross-examination, Becker acknowledged that he had testified before the grand jury to only "minimal" conversations with Plocker on these transactions (Tr. 499, A-483). Such contradictions point up the impropriety and unfairness of permitting Plocker to be quoted without having Plocker available for cross-examination.

Becker was then permitted to speculate as to Plocker's meaning in written entries made by him (Tr. 462-464, 465-469, A-446-448, 449-453) and to testify as to conversations with Plocker concerning his alleged dealings with petitioner (Tr. 465, 469-473, 477-478, A-449, 453-457, 461-462).[11] Becker testified, however, that he had nothing to do with petitioner on the deal (Tr. 507, A-491), so that obviously he could have no first-hand knowledge of any alleged conspiracy of which Plocker and petitioner were members.

Thus, without any proof that Plocker was a member of such a conspiracy, Becker was permitted to testify that Plocker made statements concerning alleged statements and conduct of petitioner, and petitioner had no opportunity to cross-examine Plocker concerning such alleged statements and conduct. Citing *United States* v. *Enright,* 579 F. 2d 980 (6th Cir. 1978), and *United States* v. *Vinson,* 606 F. 2d 149 (6th Cir. 1979), the Court of Appeals herein approved the admissibility of the hearsay, holding even that *Vinson* permits the trial Court to consider the hearsay as evidence of the existence of the conspiracy.

The question of the admissibility of co-conspirator's hearsay statements has generated much litigation, and the various Courts of Appeals have not been uniform in deciding the appropriate procedure and quantum of proof. The need for clarification of the conflict over interpretation of Rules 104 and 801(d)(2)(E) of the Federal Rules of Evidence is discussed at length in Weinstein's Evidence, ¶104[05] and ¶801(d)(2)(E)[01].

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[11] As a few examples, Becker stated that petitioner was "evidently" to receive a commission of $46,000.00 (Tr. 465-466, A-449-450), that Plocker had told him that a check had to be given to petitioner but that petitioner wanted it made out to M. T. Stuart (Tr. 477-478, A461-462), and that an invoice or commission check (Exh. 81, A-808) stated that it was being issued "per instructions from Line Dismantling, Mr. Mel Berns to Becker Metals, Mr. Stanley Plocker" (Tr. 487, A-471).

The consideration of the hearsay, without independent evidence, to establish the admissibility of the hearsay, which the Sixth Circuit herein has permitted on the authority of *Vinson*, is discussed by Weinstein at ¶ 104[05], pages 104-43 to 104-44. The majority of the Courts of Appeals which have considered this aspect of the issue are in conflict with the decision herein — see fn. 20 and 21 at page 104-44 of Weinstein. See also the recent case of *United States* v. *Radeker*, 664 F. 2d 242 (10th Cir. 1981).

We respectfully suggest that the confusion which exists among the Circuits needs resolution by this Court, and therefore certiorari should be granted as to this Question.

IV.

Attorney - client relationship

On the day before trial commenced, government counsel gave defense counsel access to many documents which came to the government from the files of White and Case, Washington attorneys for LDC and Burnup & Sims. These were the same attorneys who had participated in all stages of the investigation, preparation and presentation of the claim to Union Carbide. Mr. Brower of White and Case was the lawyer who had led the LDC discussions at the September 24, 1974 meeting at Oak Ridge and had traveled to California in November with Aul and Brewer to meet with Shulman.

The voluminous White and Case files of correspondence and memoranda revealed substantial information which no doubt led to sources of information for the prosecution. These files became available as a result of a waiver by Burnup & Sims of its attorney - client privilege (Exh. 40, A-734).

Mr. Canty, General Counsel for Burnup & Sims, testified that he also waived the attorney - client privilege with respect to a St. Louis attorney, Rodney Weiss, who had performed legal ser-

vices for LDC (Tr. 205, A-220). Mr. Weiss thereafter testified about various meetings with LDC personnel, including petitioner, and as to documents and correspondence as to which he performed legal services (Exhs. 60-63, Tr. 394-402, A-762-772, 388-396).

The attempted waiver of the attorney - client privileges by Burnup & Sims, without a similar waiver by petitioner, was improper; the documents and other evidence emanating from the attorneys, and all leads derived therefrom, should not have been available to the prosecution. In *Upjohn Company* v. *United States,* 449 U.S. 383 (1981), this Court not only protected the corporate client but communications from its employees as well.

The Court of Appeals herein unduly restricted the decision in *Upjohn* by suggesting that this Court did not discuss waiver of the privilege, and that therefore a waiver by Burnup & Sims was a waiver of petitioner's privilege. Although waiver may not have been discussed as such in *Upjohn,* we believe that its holding is clear that petitioner's communications were protected by the attorney - client privilege; who else but petitioner could waive his privilege? As this Court stated: ". . . the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."

The holding of *Upjohn* is to abolish the limited "control group" test, thereby covering communications by petitioner. Based upon *Upjohn,* the government acted in violation of petitioner's rights when it relied upon the waiver by Burnup & Sims alone. The Sixth Circuit decision is contrary to the opinion of this Court, and for this reason, certiorari should be granted as to this Question.

V.

Multiple conspiracies

If the government produced any evidence of petitioner's conspiratorial misconduct, the proof showed more than one conspiracy. There was evidence with reference to the NIMCO and SIMCO copper contracts (Exhs. 29-34, 43, A-698-703, 741) which, according to the government theory, involved Aul, petitioner and Shulman. As a second possible conspiracy, there was evidence as to Lissner, Gerald, and Becker (Exhs. 51-59, 66-70, 73, 81-85, A-753-761, 775-779, 800, 808-812) which, according to the government theory, involved Aul, petitioner and Plocker, without connection to the NIMCO/SIMCO contracts. They may have both related to copper from Union Carbide, but if there was a conspiracy to conceal the payment of $122,000.00, it had no relationship to the NIMCO/SIMCO contracts. Perhaps there was a conspiracy to deprive LDC of $122,000.00 through the Becker checks payable to Stuart, but that money had nothing to do with fraudulent claims against Union Carbide or the Department of Energy. Shulman had no involvement in any such conspiracy,[19] and Plocker had no involvement in the NIMCO/SIMCO contracts conspiracy.

The evidence of Becker checks to Jones (Exhs. 74-78, A-801-805) was unrelated to anything else, except possibly a third conspiracy. A separate conspiracy suggested by the evidence was that with reference to the kickbacks on lead by Shulman in which there was no evidence of any Plocker involvement (Exhs. 35-37, 45-47, 49-50, A-704-706, 743-745,

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[19] In fact, the prosecutor showed Shulman several Stuart checks, and he could not identify them; he testified that they were never in his possession and that he never saw anyone with the Stuart checks (Tr. 250-253, A-265-268).

747-752).[20] Whether or not petitioner received any of this money (Tr. 263-267, 299-300, A-278-282, 314-315), it had nothing to do with the conspiracy alleged in the indictment and was not a violation of the federal laws mentioned in the indictment.

The subject of multiple conspiracies has been discussed at length in many cases since *Kotteakos* v. *United States,* 328 U.S. 750 (1946). Even if the government's evidence in the instant case is to be believed absolutely and without qualification, there was no single overall conspiracy proved, but at the most there were numerous unrelated conspiracies. Under the *Kotteakos* doctrine, the case should not have been submitted to the jury.

The Sixth Circuit suggests that the jury found only one conspiracy. But with the conglomeration of evidence submitted by the government and under the charge of the District Court, the fact that the jury found petitioner guilty does not mean that they necessarily found only one conspiracy. Certainly petitioner was prejudiced by all of the disconnected evidence of unrelated kickbacks, false statements, fictitious checks, etc., all totally unrelated to any scheme to defraud the government. The prejudice to petitioner was obvious by the inferences which could be drawn from such unrelated evidence of other possible conspiracies.

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[20] The lead portion of the Union Carbide project was not in the indictment, nor in the claim submitted (Tr. 245, A-260). The lead transaction, insofar as the Oak Ridge project was concerned, was handled without incident. Shulman testified that he agreed with Aul to fraudulently down-grade the quality of the lead, so that Shulman could pay LDC a lesser amount of money, and then he agreed to split the saving with Aul (Tr. 244-249, 263-268, 276-278, 297-300, 304-306, 321-322, A-259-264, 278-283, 2941-293, 312-315, 319-321, 336-337). Again, this may have been a fraud on LDC, but it had nothing to do with any fraudulent claims to the government.

Because the Court of Appeals failed to follow the clear mandate of *Kotteakos,* we respectfully submit that certiorari should be granted as to this Question.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 80-5429
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America,
Plaintiff-Appellee,

v.

Melford Berns,
Defendant-Appellant.

ORDER

(Filed January 4, 1982)

Before: WEICK, ENGEL and MERRITT, Circuit Judges

The appellant in this case was found guilty by a jury decision of four counts of conspiracy to defraud the United States and presentation of false claims, accompanied by false statements, to a federal agency in violation of 18 U.S.C. §§ 2, 287, 371, and 1001. He appeals his conviction on several grounds, none of which compel reversal.

The scheme in which Appellant Berns was found to have participated involved the manufacture and backdating of resale contracts. By transferring legitimate resale contracts and presenting falsified contracts in their stead, Line Dismantling Corp. (appellant was vice-president; hereinafter "LDC") could retrieve excessive damages from Union Carbide Corp., a division of the Department of Energy which had breached their contract to supply LDC with scrap cable.

Appellant first argues that the prosecution is barred by the Statute of Limitations. The government introduced a letter to Contracting Officer R. J. Hart, manager of the Department of

Energy's Oak Ridge operations, into evidence. The letter was sent within the five-year limit. As the first formal claim presented to the official dispute-settling agent for the federal agency, the letter was an overt act in furtherance of the conspiracy and meets the requirements of *Gruenwald* v. *U.S.*, 353 U.S. 391 (1957).

The second objection raised by Berns is to the introduction of the testimony of Stanley Plocker, an unindicted co-conspirator who invoked his Fifth Amendment privilege prior to the trial and while on the stand. Appellant misapplies our holding in *U.S.* v. *Vandetti*, 623 F.2d 1144 (6th Cir. 1980) to argue error in allowing Plocker's testimony. In *Vandetti*, this Court ordered a new trial after a trial judge allowed a prosecutor to put convicted codefendants on the stand, knowing they would invoke their Fifth Amendment privileges, and further admitted their testimony as to those convictions. The opinion emphasizes the fact-specific criteria which must be applied in each case to evaluate the admissibility of the testimony and the prejudice suffered by the defendant. The defendant in *Vandetti* was prejudiced because the testimony of his codefendants' convictions was for an impermissible purpose, proof of the elements of the crime, rather than the permissible purpose of impeachment. The judge must weigh the probative value of the testimony offered in each case against its potential prejudice and determine if there are alternative methods for presentation of that evidence. In the case before us, the testimony of Plocker was essential to proof of the conspiracy. The questions asked were general, admissible questions dealing with the business relationship between Plocker and the appellant. Plocker also testified that he was Berns' brother-in-law, a fact which could well have aided the jury in their evaluation of the credibility of various witnesses. Therefore, we find no error in calling Plocker to the witness stand and admitting his testimony.

Appellant's third objection is against the admission of hearsay statements under the co-conspirator hearsay exception.

David Becker was president of the firm which received the legitimate resale contracts from LDC in exchange for a $122,000 commission. The transfer was arranged by Plocker. The crucial feature of the transfer was that Berns asked Plocker to make out the commission checks in the name of M. T. Stuart. Becker testified as to Plocker's explanation to him of the deal and the manner of the commission checks.

This Court held in *U.S.* v. *Enright*, 579 F.2d 980 (6th Cir. 1978) that hearsay statements may be admitted under the co-conspirator exception (Fed. R. Evid. 801(d)(2)(E)) if the government shows by a preponderance of the evidence that a conspiracy existed, the defendant against whom the hearsay is offered was a member of the conspiracy, and the statement was made in furtherance of the conspiracy. Further, that decision is within the sole province of the trial judge. In *U.S.* v. *Vinson*, 606 F.2d 149, 153 (6th Cir. 1979), this Court held that the statements themselves may be evidence of a conspiracy to be considered by the trial judge in deciding the preliminary question of admissibility. The testimony of the transfer included Berns' instructions that the commissions should be made out in a manner which later evidence showed to be part of the conspiracy. We believe Judge Taylor correctly admitted the testimony under the dictates of *Vinson*.

Appellant relies on the recent Supreme Court case of *Upjohn* v. *U.S.*, ____ U.S. ____, 101 S.Ct. 677 (1981) for his argument that his attorney-client privilege was improperly waived. He attempts to stretch the proposition of that case, that an employee need not be a member of a corporate "control group" to enjoy the general protection of the corporation's attorney-client privilege, to argue that the voluntary submission by the attorneys for Burnup & Sims, LDC's parent corporation, of records of meetings between the corporations and the Department of Energy and Union Carbide officials was an unlawful waiver of Berns' attorney-client privilege. Nothing in *Upjohn*

remotely stands for the proposition that a corporation cannot offer documents relating to meetings where its subsidiary was also present. Waiver is not discussed at all in the case. Nor has Appellant directed this Court to any other cases which make such an argument. Even if such a principle could be constructed out of thin air, Appellant has not demonstrated the prejudice suffered by the waiver.

Fifth, Berns claims that the prosecution proved no fewer than three conspiracies, each involving discrete sets of individuals and transactions. He requests reversal on the grounds that proof of multiple conspiracies cannot sustain a conviction. The prosecution argued at trial that several transactions — falsification of contracts, transfer of legitimate contracts, fraudulent downgrading of minerals, checks made out to fictitious individuals and cashed by the Appellant — were all part of a central scheme to defraud the federal government. By its guilty verdict on all four counts charged, the jury indicated they accepted the prosecution's version of the various transactions. Each of the proofs revolve around a central theme of fraudulently collecting the maximum amount of damages from a federal agency. Nor has Appellant shown prejudice to any substantial right by the admission of the several transactions. *U.S.* v. *Sutton,* 642 F.2d 1001, 1038 (6th Cir. 1980).

Finally, Berns claims his conviction must be overturned for lack of sufficient evidence. Even if the Court is not to accept his first five arguments, he contends that the prosecution did not produce sufficient evidence of his signature on the letter to Hart. Although no direct proof was offered that the signature was Berns', the record is replete with evidence (such as Berns' affidavit that he signed the fraudulent contracts enclosed with the letter) that Berns signed the letter. The letter itself also contained information which only Berns would have reason to know. In determining the sufficiency of the evidence to withstand a judgment of acquittal, the evidence and all reasonable

inferences that may be drawn therefrom must be viewed in the light most favorable to the government. *U.S.* v. *Smith*, 399 F.2d 896 (6th Cir. 1968). We find ample evidence on the record to support the jury's decision.

Accordingly, the conviction is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX B

No. 80-5429

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America,
Plaintiff-Appellee

v.

Melford Berns,
Defendant-Appellant

ORDER DENYING PETITION FOR REHEARING

(Filed April 7, 1982)

Before: WEICK, ENGEL and MERRITT, Circuit Judges

The majority of the court having not voted in favor of an en banc rehearing, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

CR. 3-80-36

United States of America

v.

Melford Berns

ORDER

(Filed November 19, 1980)

For the reasons stated in a memorandum opinion this day passed to the Clerk for filing, it is ORDERED that defendant's motion for judgment of acquittal and motion for a new trial be, and the same hereby are, denied.

Enter:

/s/ Robert Taylor
United States District Judge

MEMORANDUM

Defendant has renewed his motion for judgment of acquittal or motion for new trial made at the close of evidence and urged in support thereof twenty-one separate grounds.

Grounds 1 through 5 relate to the evidence. In the opinion of the Court the evidence created issues of fact for the determination of the jury and the verdict of the jury is supported by substantial evidence.

Grounds 6 and 7 complain of the rulings of the Court on questions of evidence. In the opinion of the Court it did not err in its rulings on questions of evidence.

Grounds 8 and 9 complain of the action of the Court in sending the exhibits which were received as evidence to the jury and in refusing to give instructions offered by defendant. The Court followed the usual practice in sending these exhibits to the jury and in its opinion did not err in so doing. The instructions given by the Court, in its opinion, were proper.

Ground 10 complains of the action of the Court in sending the indictment to the jury which differed from the indictment as read in the Court's instructions. The Court explained to the jury in the charge that Aul was not before the Court.

Grounds 11 and 12 insist that the Court erred in submitting the case to the jury because the Government failed to prove a violation of federal law and the applicable statute of limitations. The proof showed that at least one of the overt acts charged in the indictment occurred within the five year period. In the opinion of the Court it did not err in submitting the case to the jury.

Ground 13 complains of the action of the Court in refusing to require the Government to elect on which count the cause should be submitted to the jury. There was evidence to submit to the jury on all counts.

Ground 14 asserts that there were several different conspiracies. The evidence showed that there was one conspiracy, possibly consisting of many interlocking events.

In Ground 15, it is asserted that the Court erred in permitting evidence concerning Lissner Metals, Gerald Metals and Becker Iron & Metal Company, because it had no relationship to the alleged false claims or the charges contained in the indictment. We do not agree.

In Ground 16 it is asserted that the Court erred in permitting evidence concerning the activities of and statements by Gerald Aul, because there was no independent evidence of a conspiracy between Mr. Aul and defendant Berns. We do not agree.

In Ground 17 it is asserted that the Court erred in permitting evidence of activities of Stanley Plocker, because there was no independent evidence of a conspiracy between Mr. Plocker and defendant Berns. We do not agree.

In Ground 18 it is asserted that the Court erred in permitting witness Shulman to testify concerning alleged downgrading of lead shipments and kickbacks pertaining thereto, because it was not alleged in the indictment and had no relationship to the crimes charged in the indictment. The evidence received appeared to be a part of the same plan by the conspirators and the evidence was properly received.

In Ground 19 it is asserted that the Court erred in permitting witness Plocker to invoke his Fifth Amendment privileges in front of the jury. The evidence did not indicate that the Attorney General called Plocker for the purpose of wrongfully influencing the jury. While Plocker was on the witness stand, the case was recessed in order to give the District Attorney an opportunity to contact the Attorney General of the United States in order to get permission to grant Plocker immunity. We did not receive any information from the District Attorney after Plocker left the stand but have been advised that the Attorney General did not act on the District Attorney's request in time for the District Attorney to place Plocker back on the witness stand. In the opinion of the Court, it was not error for the District Attorney to call Plocker to the witness stand under the circumstances shown in the record. *See United States* v. *Vandetti*, 623 F.2d 1144 (6th Cir. 1980).

Grounds 20 and 21 complain of the action of the Court in permitting witness Becker to identify documents pertaining to

Jones and Stuart checks and permitting Becker to testify concerning statements by Stanley Plocker which were not connected by other evidence with any alleged conspiracy charged in the indictment, and in refusing to strike such testimony after the Government failed to offer any evidence of the involvement in any conspiracy. In the opinion of the Court there was evidence in the record showing a conspiracy involving the defendant and Plocker and this evidence, in the opinion of the Court, was competent.

For the reasons indicated, it is ORDERED that the motion for judgment of acquittal and motion for a new trial be, and the same hereby are, denied.

Order Accordingly.

/s/ Robert Taylor
United States District Judge

APPENDIX D

Constitution of United States

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX E

Title 18, United States Code

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeaner only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

§ 287. False, fictitious or fraudulent claims

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

§ 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

§ 3282. Offenses not capital

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

APPENDIX F

Federal Rules of Evidence

Rule 104. Preliminary Questions

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Rule 801. Definitions

The following definitions apply under this article:

• • • •

(d) Statements which are not hearsay. A statement is not hearsay if—

• • • •

(2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.